9-24-2010

# Patterson v. State, Dept. of Health Appellant's Reply Brief Dckt. 37416

# IN THE SUPREME COURT OF THE STATE OF IDAHO

Lynette Patterson,

Plaintiff/Appellant

v.

State of Idaho Department of Health and Welfare and John/Jane Does I through X, whose true identities are presently unknown,

Defendants/Respondents

**Supreme Court Case No. 37416-2010**

**REPLY BRIEF OF APPELLANT**

**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

HONORABLE MICHAEL McLAUGHLIN, PRESIDING DISTRICT JUDGE

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## I. ADDITIONAL ARGUMENTS AND AUTHORITIES IN REPLY TO IDHW'S BRIEF PURSUANT TO I.A.R. 35(c)

While, of course, maintaining all arguments and authorities presented in her opening brief, Appellant/Plaintiff, Lynette Patterson ("Patterson") asserts the following additional positions in support of her appeal in this matter and in reply to the responsive brief filed by Respondent/Defendant, Idaho Department of Health & Welfare ("IDHW"). Of particular note, relative to her appellate positions regarding her claim under the Idaho Human Rights Act ("IHRA"), I.C. §67-5901, *et seq.*, Patterson replies to IDHW's arguments by distinguishing the two, separate, anti-retaliation protections she enjoys pursuant to the Civil Rights Act of 1964 (generally "Title VII"), 42 U.S.C. §2000e-5, *et seq.* Under the protection afforded her by the participation clause, the objective reasonableness of Patterson's complaints of illegal conduct is not material. Under this analysis, the summary judgment entered on IHRA's claims should be set aside.

Further, under the opposition clause, ample and genuine issues of material fact exist regarding the objective reasonableness of Patterson's complaints of illegal, workplace conduct, and the existence of these factual issues mandates a reversal of the summary judgment entered on Patterson's IHRA claim. On this last point, this reply brief also provides additional, significant authority which supports the proposition that Patterson's complaints about the workplace conduct being illegal were objectively reasonable.

Finally with respect to her IHRA claim and though IDHW did not file a notice of cross-appeal on this point, IDHW asserts in its appellate brief that the District Court erred in finding that Patterson had been subjected to an adverse employment action. In this reply brief, Patterson will set forth the factual and legal bases that supported that ruling.

By laying out such bases, this Court will recognize that the District Court's ruling was appropriate, as genuine issues of material fact exist which preclude the entry of summary judgment on this point.

Relative to her claim under the Idaho Protection of Public Employees Act ("IPPEA"), I.C. §6-2101, *et seq.*, Patterson herein provides additional authority and fleshes out further her argument that IDHW waived its affirmative defense of statute of limitations by failing to plead it.

### A. This Court Should Reverse the District Court's Dismissal of Patterson's IHRA Claim.

As is well-settled, pursuant to *O'Dell v. Basabe*, 119 Idaho 796, 811, 810 P.2d 1082, 1097 (1991), Idaho courts are to look to the growing body of federal case law in interpreting the parameters of the IHRA. In turn, most of the authority relied upon by Patterson in arguing her IHRA claim has been issued by federal courts.

#### 1. The dismissal of Patterson's IHRA claim was improper, as she can establish the *prima facie* case for Title VII retaliation under the participation clause.

An employer is prohibited from retaliating against an employee for opposing an unlawful employment practice or making a charge in an employment discrimination investigation or proceeding. *Lam v. Univ. of Hawaii,* 40 F.3d 1551, 1558-59 (9th Cir.1994); *Davenport v. Bd. of Trustees of the State Center of Community College District*, 654 F.Supp.2d 1073, 1086-1087 (E.D.Cal. 2009). In the case *sub judice*, Patterson was participating in an employment discrimination investigation, when she voiced her complaints about the affair and preferential treatment to her employer's, a public agency's, human resources personnel and civil rights investigators.

The anti-retaliation provision of Title VII states:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has **opposed** any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or **participated** in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. §2000e-3(a) (emphasis added).

As the Ninth Circuit has held:

> **An employer can violate the anti-retaliation provisions of Title VII in either of two ways: "(1) if the [adverse employment action] occurs because of the employee's opposition to conduct made an unlawful employment practice by the subchapter, or (2) if it is in retaliation for the employee's participation in the machinery set up by Title VII to enforce its provisions."** *Silver v. KCA, Inc.,* 586 F.2d 138, 141 (9th Cir.1978) (interpreting 42 U.S.C. § 2000e-3(a) (§ 704(a))). "The considerations controlling the interpretation of the opposition clause are not entirely the same as those applying to the participation clause. The purpose of the latter is to protect the employee who utilizes the tools provided by Congress to protect his rights." *Sias v. City Demonstration Agency,* 588 F.2d 692, 695 (9th Cir.1978). The district court appears to have examined Hashimoto's retaliation claim under the opposition clause only. **Under the participation clause, however, there can be little doubt that Hashimoto's visit with the EEO counselor constituted participation "in the machinery set up by Title VII." As such, it was protected activity.** *See, e.g., Eastland v. Tennessee Valley Auth.,* 704 F.2d 613, 627 (11th Cir.1983) (contacting an EEO officer is protected activity); *Gonzalez v. Bolger,* 486 F.Supp. 595, 601 (D.D.C.1980) ("Once plaintiff ... initiates pre-complaint contact with an EEO counselor ... he is participating in a Title VII proceeding." (citations

> omitted)), *aff'd,* 656 F.2d 899 (D.C.Cir.1981). Thus, we conclude that the district court erred in determining that Hashimoto failed to establish a prima facie case of retaliation.

*Hashimoto v. Dalton*, 118 F.3d 671, 680 (emphasis added); *see also Whitley v. City of Portland*, 654 F.Supp.2d 1194, 1213 (D.Or. 2009). In the case at bar, Patterson is protected by the participation clause within Title VII's anti-retaliation provision.

When Patterson complained to IDHW's human resources professionals and civil rights investigators, Bethany Zimmerman, Monica Young, and Heidi Graham, she was participating in the "machinery set up by Title VII." IDHW is obviously, as a state agency, a governmental actor. IDHW's employees are clearly acting on behalf of the state government, when they act within the course and scope of their employments. When Patterson complained to IDHW personnel within its human resources department, she was complaining to persons who were, in part, some of the machinery set up by Title VII and to police workplaces under that statute.

Patterson complained on numerous occasions to these state actors about the illicit, intra-office romantic affair that was occurring between her supervisor and a coworker; she also complained about the preferential treatment which was occurring in the workplace as a result of that affair. R., Vol. III, p. 596; R., Vol. IV, pp. 626-627. Plaintiff's own, credible affidavit testimony also sets forth the civil rights nature of her complaints regarding the affair and the preferential treatment as well as IDHW's own recognition that that Patterson was engaging in a civil rights/Title VII investigation. R., Vol. IV, pp. 777-778. As such, she is protected by the participation clause within Title VII's anti-retaliation provision.

When protected by the participation clause, a plaintiff-employee is not required to demonstrate that her complaints were either expressing actual violations of law or were objectively-reasonable, if not actual violations of law. Under the participation clause, even a visit with an EEO counselor, similar to IDHW's human resources/civil rights investigators (i.e. Zimmerman, Graham, and Young), constituted participation "in the machinery set up by Title VII." *See, e.g., E.E.O.C. v. California Psychiatric Transitions, Inc.*, 2010 WL 2754358, *5 (E.D.Cal. 2010) (citing *Hashimoto v. Dalton*, 118 F.3d 671, 680 (9th Cir. 1997)).

The participation clause includes those whom the employer has reason to believe is assisting the employee in protected activity. *Id.* (citing *Wilken v. Cascadia Behavioral Health Care, Inc.*, 2007 WL 2916482, *27 (D.Or. 2007)). IDHW, by employing Zimmerman, Graham, and Young in their positions, certainly had reason to believe that these individuals were assisting Patterson in protected activity (i.e. complaints of preferential treatment and pay as a result of an intra-office, romantic affair).

Given the intentionally broad ambit of the participation clause, Patterson was certainly engaged in a protected activity, when she complained to IDHW personnel about the affair and its attendant preferential treatment. Once engaged in that protected activity, Patterson could not be retaliated against. It is of no import that paramour favoritism does not violate Title VII; that analysis is only necessary under the opposition clause of 42 U.S.C. §§2000e-3(a). By contrast, under the participation clause of that statute, the employee-plaintiff's accuracy in reporting workplace conduct as illegal, as well as her good faith and reasonable belief in that illegality, are immaterial to the analysis. *Hashimoto v. Dalton*, 118 F.3d 671, 680 (9th Cir. 1997); *Booker v. Brown &*

*Williamson Tobacco Co.*, 879 F.2d 1304, 1312 (6th Cir. 1989); *Johnson v. Holway*, 439 F.Supp.2d 180, 222 (D.D.C. 2006). In turn, whether paramour favoritism is illegal under Title VII and whether an objectively-reasonable person would consider it such are of no concern in gauging this case under the participation clause. *Id.*

In the case *sub judice*, while the reasonableness of Patterson's beliefs about the illegality of the affair and its resultant preferential treatment are considerations for the discussion, *infra*, regarding the opposition clause, it is not germane in the present discuss of the participation clause. When Patterson complained about perceived illegal conduct to the human resources/civil rights investigators within her state agency, she automatically was protected by the participation clause. As such, she was engaged in a protected activity.

Being engaged in a "protected activity" is the first element of the *prima facie* case for retaliation under Title VII. *See, e.g., Surrell v. California Water Serv. Co.*, 518 F.3d 1097, 1108 (9th Cir. 2008); *EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1013 (9th Cir. 1983). When an employee protests the actions of a supervisor as being violative of Title VII, such opposition is a protected activity for analysis of a retaliation claim under Title VII. *See, e.g., E.E.O.C. v. Go Daddy Software, Inc.*, 581 F.3d 951, 963 (9th Cir. 2009); *Trent v. Valley Electric Ass'n, Inc.*, 41 F.3d 524, 526 (9th Cir. 1994). Even informal complaints constitute protected activity. *Noga v. Costco Wholesale Corp.*, 583 F.Supp.2d 1245, 1262 (D.Or. 2008) (citing *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 506 (9th Cir. 2000); *Knox v. City of Portland*, 543 F.Supp.2d 1238, 1248 (D.Or. 2008). Under these plaintiff-friendly standards, which encourage employees to come forward about workplace misbehavior rather than chilling such

efforts, Patterson has demonstrated that her complaints about the affair and preferential treatment are "protected activity."

By being engaged in a protected activity under Title VII due to her participation in the agency's investigations and discussing the affair and preferential treatment with Zimmerman, Graham, and Young, it was error for the District Court to grant summary judgment on Patterson's IHRA claim. Patterson's IHRA claim should be reinstated and remanded to the trial court.

**2. The dismissal of Patterson's IHRA claim was improper, as she can establish the *prima facie* case for Title VII retaliation under the opposition clause, as her complaints and beliefs were objectively reasonable.**

Throughout this litigation, much ink has been spilled relative to whether paramour favoritism is illegal under Title VII. Patterson recognizes that the clear weight of authority is that paramour favoritism is not illegal under Title VII. However, that is not the critical enquiry. If Patterson can demonstrate a genuine issue of material fact that she held a good faith, reasonable belief that paramour favoritism could be illegal, then the District Court's grant of summary judgment on her IHRA claim must be reversed.

In a Title VII-retaliation case, the complained-of conduct need not actually be illegal, but the employee must prove that a reasonable person might have believed that it was true. *Osher v. Univ. of Maine System*, 703 F.Supp.2d 51, 66 (D.Me. 2010) (citing *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 262 (1st Cir. 1999)). Whether a plaintiff's belief was 'objectively reasonable,' and not merely subjective, is determined based on the facts and the record presented. *Martin v. State University of New York*, 704 F.Supp.2d 202, 228 (E.D.N.Y. 2010) (citing *Thomas v. Westchester County Health Care Corp.*, 232 F.Supp.2d 273, 279 (S.D.N.Y. 2002). Objectiveness, as it is measured in this

context (i.e. Title VII-retaliation cases), must make due allowance for the limited knowledge possessed by most Title VII plaintiffs about the factual and legal bases of their claims. *Moyo v. Gomez*, 40 F.3d 982, 985 (9th Cir. 1994). This last point should resonate, as it recognizes the societal reality that most American employees are not familiar with the intricacies of Title VII law.

The standard used is that of a "reasonable person," not a "reasonable lawyer" or a "reasonable paralegal." Patterson's knowledge of the substantive law relative to violations of Title VII is not dispositive of this aspect of the instant appeal. There is evidence in the record from which a jury could properly determine that Patterson's beliefs about illegal, workplace conduct were objectively reasonable. The most notable evidence comes from her own interactions with and directives from her former employer, IDHW.

First, IDHW's own human resources/civil rights personnel and investigators (i.e. Young, Zimmerman, and Graham) specifically advised Patterson that they were looking into "Title VII" violations relative to the intra-office affair and potential, preferential treatment that were occurring and that Patterson could seek further redress, if she was dissatisfied with the outcomes of these investigations. R., Vol. IV, pp. 777-779. Under these facts and circumstances, most every reasonable employee, if her employer is a reliable one (as one hopes a state agency is), would believe that the paramour favoritism that was occurring was illegal. Patterson is no different than any other such employee. Herein is genuine evidence that Patterson's beliefs were objectively reasonable.

Second, IDHW specifically trained Patterson, in personnel trainings and workshops, that paramour favoritism was illegal and created a hostile work environment.

R., Vol. IV, pp. 776-777 and 782-792. Again, if one's employer is a reliable one, it is reasonable for an employee to trust that the employment trainings being afforded her are accurate statements. *Appellant's Opening Brief* at 10-11.

Most notably, IDHW's arguments that the foregoing facts should basically be disregarded seem to forget that Patterson, at the summary judgment stage of the proceedings, is entitled to have every reasonable inference drawn in her favor as the non-moving party. This certainly is the situation, where IDHW argues that Patterson's own affidavit somehow shows she did not consider paramour favoritism to be illegal until a late date (i.e. after she engaged in the protected activity). *Respondent Idaho Department of Health & Welfare's Response Brief* at 18-19.

This position is unfounded and ignores significant evidence in the record, including, not the least of which, specific paragraphs from that very affidavit. In the *Affidavit of Lynette Patterson in Support of Plaintiff's Motion for Reconsideration of Order Granting Summary Judgment on Plaintiff's IHRA Claim* (R., Vol. IV, p. 776 through R., Vol. V, p. 801), Patterson clearly spells out, in ¶¶4,5,6, and 8, that she had valid reasons to believe that the intra-office affair and preferential treatment were illegal and creating a hostile work environment. These paragraphs also set forth that she held these beliefs in the December 2004 through August 2005 time frame, which would be the same period when she was engaging in the activities protected under Title VII. R., Vol. IV, pp. 777-779. In turn, Patterson's own affidavit is not fatal as IDHW characterizes, especially as Patterson is the one entitled to every reasonable inference from the evidence, including the reasonable inferences to be drawn from IDHW's own training materials on sexual harassment and hostile work environment.

Apparently recognizing that its own training manuals indicate that paramour favoritism may be illegal, IDHW argues that an employer's own training manuals cannot provide a plaintiff with a reasonable basis to believe that she is engaging in protected activity. In doing so, IDHW relies upon *Sherk v. Adea Atlanta, L.L.C.*, 432 F.Supp.2d 1358 (N.D.Ga. 2006). This case is distinguishable.

In *Sherk*, the employer's ethics handbook simply adopted a more restrictive policy regarding paramour favoritism than governing law in the Eleventh Circuit provided. *Sherk*, 432 F.Supp.2d at 1372. In the case at bar, IDHW also adopted a more restrictive policy on paramour favoritism and romantic relationships in the workplace. R., Vol. III, pp. 558-561. However, and more importantly, IDHW went much farther than did the employer in *Sherk*. IDHW went well beyond simply adopting a restrictive policy on romantic relationships in the workplace.

IDHW actually trained its employees, including Patterson, that, "A sexually hostile work environment can be created by. . .granting job favors to those who participate in consensual sexual activity." R., Vol. IV, pp. 776-777 and 783. IDHW should not be allowed to run from this fact. It trained Patterson to believe that the preferential treatment which Stiles and the SUR Unit were receiving, as a result of the Warren/Stiles affair and at the expense of Patterson and the Fraud Unit, could well be considered a "sexually hostile work environment." Frankly, there is probably no better evidence that a Title VII-retaliation plaintiff could proffer to show her objective reasonableness in believing that paramour favoritism was illegal.

In a further, strained argument asserting that Patterson's beliefs were not objectively reasonable, IDHW contends that issues of reasonableness can be decided as a

matter of law. *Respondent Idaho Department of Health & Welfare's Response Brief* at 15-18. While Plaintiff recognizes that such may rarely be the case, it certainly is not the more common and generally-recognized rule of law in Idaho. *See, e.g., Davis v. Parrish*, 131 Idaho 595, 597, 961 P.2d 1198, 1200 (1998); *Thiel v. Stradley*, 118 Idaho 86, 88, 794 P.2d 1142, 1144 (1990); *Young v. State Farm Mut. Auto. Ins. Co.*, 127 Idaho 122, 126, 898 P.2d 53 (1995); *Reynolds v. American Hardware Mut. Ins. Co.*, 115 Idaho 362, 365, 766 P.2d 1243, 1246 (1988). Moreover, in the face of above-noted evidence creating genuine issues of material fact relative to Patterson's objective reasonableness, this issue cannot be decided as a matter of law.

IDHW cites *Reece v. Pocatello/Chubbuck Sch. Dist.*, 2010 WL 1817787 (D.Idaho 2010), for the proposition that reasonableness can be decided as a matter of law. Much like *Sherk*, the *Reece* case is materially and dispositively distinguishable from the case at bar. In *Reece*, no reasonable person could conclude that the plaintiff was engaged in protected activity under Title VII, because the plaintiff's/school teacher's complaints were about the sexual harassment of students, not coworkers. *Reece*, 2010 WL 1817787, *9. Title VII does not seek to regulate or manage teacher/student relationships, only employer/employee relationships. The very language of the statute itself only proscribes discrimination against an individual, "...[W]ith respect to his compensation, terms, conditions, or privileges of **employment**." 42 U.S.C. §2000-3(a) (emphasis added). Interestingly, Judge Winmill in *Reece* specifically relied upon the same instructional ruling from *Moyo v. Gomez*, 32 F.3d 1382, 1385 (9th Cir. 1994) (""...[T]he Ninth Circuit held that the reasonableness of a plaintiff's belief that an unlawful employment practice occurred must be assessed according to an objective standard, 'one that makes due

allowance, moreover, for the limited knowledge possessed by most Title VII plaintiffs about the factual and legal bases of their claims."), upon which Patterson bases part of her own reasonableness argument, *supra*.

IDHW also cites *Moberly v. Midcontinent Communication*, 2010 WL 1856454 (D.S.D. 2010), for the proposition that a Title VII-retaliation plaintiff's reasonableness can be decided as a matter of law. Again, as with *Shrek* and *Reece*, IDHW's reliance on *Moberly* is misplaced.

In *Moberly*, the court found that the plaintiff's beliefs were neither subjectively nor objectively reasonable. *Moberly*, 2010 WL 1856454, *16. By contrast, in the case *sub judice*, the District Court has specifically found, "The Court fully credits [Patterson's] assertion throughout this litigation that she believed in good faith the conduct she opposed was unlawful." R., Vol. V, p. 840. That finding in itself makes *Moberly* materially inapposite to the case at bar. With the trial court already finding that her beliefs were subjectively reasonable and held in good faith, the objective reasonableness of Patterson's beliefs about improprieties in the workplace is that much more of a jury question.

Patterson's reasonableness can only be decided as a matter of law, if no reasonable person could believe that the affair and preferential treatment were violations of Title VII. *See, e.g., Clark County Sch. Dist. v. Breeden*, 532 U.S., 268, 269-271, 121 S.Ct. 1508, 1509-1511, 149 L.Ed.2d 509 (2001). Given Patterson's discussions with IDHW's own human resources/civil rights personnel and investigators that Title VII violations were being investigated, IDHW's specific training of her that paramour favoritism could be illegal, and her complaint filed with the Idaho Human Rights

Commission that identified and alleged a hostile work environment (R., Vol. III, pp. 563-565), reasonable people could properly conclude that Patterson's belief that paramour favoritism was illegal was held with objective reasonableness.

### 3. If this Court reviews the District Court's finding that Patterson was subjected to an adverse employment action, it should not disturb that finding, as genuine issues of material fact preclude the entry of summary judgment on this point.

In the trial court proceedings, IDHW moved for summary judgment on the second element of a retaliation claim (i.e. adverse employment action). That aspect of its summary judgment motion was denied. R., Vol. IV, p. 765. Without having filed any notice of cross-appeal, IDHW nonetheless challenges in this appeal that ruling from the District Court. While I.A.R. 35(b)(4) allows an appellee to raise additional issues on appeal, if an appellant's issues on appeal are insufficient, incomplete, or raise additional issues for review, nevertheless this Court should not even consider this argument. The denial of a summary judgment is not an appealable order. *Aardeman v. U.S. Dairy Systems, Inc.*, 147 Idaho 785, 789, 215 P.3d 505, 509 (2009); *Hunter v. Dep't of Corr.*, 138 Idaho 44, 46, 57 P.3d 755, 757 (2002); *Nationsbanc Mortgage Corp. v. Cazier*, 127 Idaho 879, 884, 908 P.2d 572, 577 (Ct.App. 1995); *Ernst v. Hemenway and Moser Co., Inc.*, 126 Idaho 980, 895 P.2d 581 (Ct.App. 1995) ("...[A]n order denying a motion for summary judgment is nonappealable *per se* and not reviewable."); *Keeler v. Keeler*, 124 Idaho 407, 410, 860 P.2d 23, 26 (Ct.App. 1993). That is precisely what IDHW is appealing here – the denial of a portion of its summary judgment motion.

However, should this Court substantively entertain IDHW's argument on this point in the face of clear precedent to the contrary, Patterson asserts the same arguments she raised in the trial court. These arguments resulted, of course, in a finding that

genuine issues of material fact existed which resulted in the denial of summary judgment on the "adverse employment action" element of the *prima facie* case for Title VII retaliation. R., Vol. IV, p. 765. Patterson thus incorporates by reference herein her arguments and authorities from the trial court on this point. *See* R., Vol. III, pp. 534-540 (*Memorandum in Opposition to Defendant's Motion for Summary Judgment*), R., Vol. III, pp. 497-524 (*Statement of Disputed Facts in Opposition to Defendant's Motion for Summary Judgment*), and R., Vol. III, p. 548 through Vol. IV, p. 729 (*Affidavit of Jason R.N. Monteleone in Opposition to Defendant's Motion for Summary Judgment*).

In the trial court, Patterson clearly demonstrated that genuine issues of material fact exist relative to the issue of whether IDHW, her former employer, subjected her to any adverse employment actions. As such, the District Court's ruling on this point should not be disturbed.

### B. This Court Should Reverse the District Court's Dismissal of Patterson's IPPEA Claim.

In her opening brief, Appellant previously outlined the factual issues that should have prevented the entry of summary judgment on her IPPEA claim and will not repeat them here. With the waiver portion of her argument, Patterson is primarily simply requesting this Court to apply the governing procedural rules, as they have been written.

The law in Idaho is clear, and has even been most recently announced by the Idaho Court of Appeals, that the failure to plead an affirmative defense required under I.R.C.P. 8(c) normally results in the waiver of that defense. *Nguyen v. Bui*, 146 Idaho 187, 191, 191 P.3d 1107, 1101 (Ct.App. 2008) (citing *Cole v. State*, 135 Idaho 107, 100, 15 P.3d 820, 823 (2000), *Garren v. Butigan*, 95 Idaho 355, 357-359, 509 P.2d 340, 342-

344 (1973), and *Hartwell Corp. v. Smith*, 107 Idaho 134, 138, 686 P.2d 79, 83 (Ct.App. 1984)). In facing the litany of Idaho cases that addresses the waiver of Rule 8(c) affirmative defenses for failure to plead, IDHW relies on *Fuhriman v. State of Idaho, Dep't of Transp.*, 143 Idaho 800, 153 P.3d 480 (2007), a case that does not even involve an affirmative defense enumerated within I.R.C.P. 8(c).

*Fuhriman* involved the statutory employer rule, under I.C. §72-223, an affirmative defense commonly-raised in hybrid tort actions in Idaho, where there is a workers' compensation claim and a related, third-party personal injury action. *Fuhriman*, 143 Idaho at 803, 153 P.3d at 483. However, that rule of law is not one of the affirmative defenses referenced in I.R.C.P. 8(c). In turn, *Fuhriman* does not drill down to the core issue here.

I.R.C.P. 8(c), in clear, mandatory terms, states, "In pleading to a preceding pleading, a party **shall** set forth affirmatively...statute of limitations...." I.R.C.P. 8(c) (emphasis added). Idaho's courts, unlike the federal courts, require a defending party to go even one step further and to specifically identify the precise statute that is providing the limitations defense. I.R.C.P. 9(h). Despite these procedural requirements in Idaho, it is uncontroverted that IDHW never affirmatively raised a limitations defense until the summary judgment proceedings. It never pled statute of limitations as an affirmative defense in either its answer or its amended answer. Thus, under Idaho law, *supra*, it has waived that defense.

During the trial court proceedings of the instant appeal, the District Court followed *Fuhriman*, though it recognized the statutory employer rule is not an 8(c) defense, because it found that *Fuhriman* relied on *Bluestone v. Matthewson,* 103 Idaho

453, 649 P.2d 1209 (1982), which did involve an 8(c) defense, the statute of frauds. R., Vol. IV, p. 762. However, a full reading of *Bluestone* presents sound analysis supporting the proposition that IDHW waived its limitations defense.

In *Bluestone*, the Idaho Supreme Court was reviewing a $390.00 dispute that had originated in the Magistrate Court of Nez Perce County. *Bluestone*, 103 Idaho at 453, 649 P.2d at 1209. The affirmative defense at issue was the statute of frauds. *Bluestone*, 103 Idaho at 454, 649 P.2d at 1210. Procedurally, the magistrate judge applied the statute of frauds defense, though it had not been pled, but the district judge found there had been a waiver of the statute of frauds defense. *Id.* In Idaho, appeals from Magistrate Court to District Court, in civil cases from a small claims department (e.g. $390.00) are conducted *de novo*. I.R.C.P. 83(b). In turn, the district judge in *Bluestone* was not obligated to follow the ruling that came out of the Magistrate Court. As the proceeding began anew at the district court level, and the statute of frauds had been raised (though not actually pled) at the magistrate court level, the parties were all fairly apprised at the practical inception of the litigation (i.e. the *de novo* review at the district court level). In turn, there was no substantial prejudice caused to any party in *Bluestone* by the failure to plead the statute of frauds as an affirmative defense, as the proceedings began anew at the district court level, but the statute of frauds defense had been considered at the magistrate court level. Here, such is not the case, as Patterson will suffer severe prejudice, if her IPPEA claim is dismissed with a limitations defense that was never pled by IDHW.

Basically, the cases relied upon by IDHW that find no waiver of the affirmative defense are very procedurally distinct from the case at bar. Unlike those cases where the initial, formal position taken by the defending party in a litigation was its summary

judgment motion or otherwise occurred in situations where it was an appeal from a magistrate decision, the instant case had a much different, procedural history during its trial court proceedings. IDHW, unlike the parties tardily asserting the affirmative defenses in *Fuhriman* and *Bluestone*, answered the complaint, amended its answer once by stipulation, never moved to amend its answer further in over two years of litigation, yet still failed to properly plead statute of limitations, a defense which is specifically listed in I.R.C.P. 8(c) and also is subject to the particularity and specificity requirements of I.R.C.P. 9(h).

Where, as here, a party has had multiple opportunities to plead the affirmative defense of statute of limitations, as procedurally required, that party must meet the pleading mandates of I.R.C.P. 8(c) and 9(h). Thus IDHW, by failing to raise its limitations defense until the summary judgment stage of this litigation, waived that defense. The trial court should therefore not have dismissed Patterson's IPPEA claim on this basis.

## II. CONCLUSION

Based on the foregoing arguments and authorities, as well as those outlined in her opening brief, Patterson respectfully requests this Court to reverse the entries of summary judgment on both the IHRA and IPPEA claims and remand this case to the District Court for adjudication through trial by jury.

DATED this 24th day of September, 2010.

JOHNSON & MONTELEONE, L.L.P.

Jason R.N. Monteleone
Attorney for Appellant, ~~Lynette Patterson~~

**CERTIFICATE OF MAILING, DELIVERY, OR FACSIMILE TRANSMISSION**

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